Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

Teresa and Larry Frakes,

Petitioners

v.

Precision Tune, Inc.,
John Garies, William Grimaud,
and Grimaud Enterprises, Inc.

Respondents

On Petition for Writ of Certiorari
To The Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

JAMES E. STARNES
2 E. Bryan Street
Suite 1500
Savannah, GA 31401
Ph. (912) 233-5700
Fax (912) 233-8999

Counsel for Petitioners

QUESTIONS PRESENTED

The Supreme Court of Alabama affirmed a lower court ruling that sent all six parties to Virginia, even though (a) four of the parties had absolutely no connection with Virginia, (b) Virginia was incapable of constitutionally exercising jurisdiction over all the parties, (c) the written agreement containing the forum selection clause (which formed the foundation of the Alabama Supreme Court's ruling) was not signed by four of the six parties, (d) the venue objection was not raised in the trial court until four years after suit had been filed, and (e) the claims sent to Virginia were based on the Alabama Deceptive Trade Practices Act (DTPA) – a statute specifically enacted to protect Alabama consumers from being victimized by the fraudulent marketing practices of predatory franchisors.

The questions raised in this appeal are:

1. Whether Virginia, which had no demonstrated connection with at least four of the six litigants, had the "minimal contacts" needed to sustain jurisdiction under *Hanson v. Denckla*, 357 U.S. 235 (1958).

2. Whether the "presumption of validity" accorded most forum selection clauses in commercial settings, should apply to consumer claims brought pursuant to state deceptive trade practices acts. *See M/S Bremen v.Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) (Forum selection clauses are

enforceable, so long as they are not unfair, unreasonable under the circumstances, or contrary to public policy).

3. Whether forum selection clauses in actions involving state consumer protection claims should be deemed "presumptively *invalid*," thereby shifting the burden on the moving party to demonstrate why the clause should be enforced.

4. Whether the Alabama Supreme Court's decision in the instant case violated due process and/or otherwise contravened federal law per *Bremen*, by sending the underlying case to Virginia when: (a) suit was filed pursuant to an Alabama statute specifically enacted to protect Alabama citizens from financial victimization, and/or unfair and deceptive trade practices, perpetrated by predatory, out-of-state franchisors. *Ala. Code 1975, § 8-19-1, et seq.*, (b) Petitioners were solicited in Alabama, and all parties were engaged in business there; (c) four of the six parties had no demonstrated contacts with Virginia; (d) Petitioners operated their franchise entirely within Alabama, and (e) Respondents' promises of full training and field support were made and/or performed (or, more accurately, *not* performed) in Alabama.

5. Whether Respondents' venue-based objections – which were raised long after the Alabama Supreme Court began enforcing forum choice clauses in written agreements – could be constitutionally raised for the first time, *consistent with due process principles*, four years after

suit had been filed, and in apparent contravention of Alabama procedural rules, i.e., Rule 12(h) (requiring such objections to be raised in the party's first responsive pleading).

PARTIES TO THE PROCEEDINGS BELOW

The Petitioners-Appellants below, and Petitioners in this Court, are **Teresa and Larry Frakes**, a husband and wife from Madison County, Alabama, who initially filed suit in Madison County, Alabama.

The Respondents-Appellees below, and Respondents in this Court, are **Precision Tune, Inc**. (a company that franchises auto repair centers in northern Alabama), **Grimaud Enterprises, Inc**. (exclusive sub-franchisor for Precision Tune in northern Alabama), **John Garies** (a recruiter and site selection manager for Precision Tune and Grimaud Enterprises in northern Alabama), and **William Grimaud** (a field manager for Grimaud Enterprises in northern Alabama).

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PETITION FOR WRIT OF CERTIORARI

Petitioners Teresa and Larry Frakes, husband and wife, respectfully petition for a writ of certiorari to vacate and remand the judgment of the Alabama Supreme Court, which affirmed a trial court order sending the case to Virginia — a state with which four of six parties had no conceivable connection. Petitioner's request is based on this Court's ruling in *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972) and subsequent decisions, all which hold that forum selection clauses are presumptively valid, but which

also state that such clauses should *not* be enforced if they are "unfair, unreasonable under the circumstances, or contrary to public policy."

In exporting this case to Virginia – a state incapable of constitutionally exercising jurisdiction over four of the six parties – the Alabama Supreme Court not only violated every major tenet of *Bremen*, but it also controverted federal constitutional law as articulated in *Hanson v. Denckla* (requiring that parties have "minimal contacts" with the forum state.

The Alabama Supreme Court also violated the due process rights of the Petitioners, and the public policy interests of the State of Alabama, which specifically enacted the DTPA to protect Alabama citizens from the unfair and deceptive trade practices of predatory out-of-state franchisors.

Issuance of a writ of certiorari is appropriate, not only to correct the Alabama Supreme Court's misapplication and misinterpretation of federal law, but to provide a litmus test to other courts, many of which are routinely being asked what weight to accord forum selection clauses in consumer protection cases, as opposed to forum selection clauses which arise in purely commercial settings.

Various other state courts, consistent with the public policy considerations identified in *Bremen*, have held forum selection clauses in such agreements presumptively

invalid. See e.g., Kubis v. Sun Microsystems, Inc., 680 A.2d 618 (NJ 1996) (legislature's intent as evidenced by enactment of franchise protection act, renders forum selection clauses in franchise agreements presumptively invalid per *Bremen*); *Triangle Trading Co., Inc. v. Robroy Indus., Inc.*, 952 F.Supp. 75 (D.P.R. 1997) (forum selection clause which violates public policy is unenforceable per *Bremen*); *Pinnacle Software v. Forms, Inc.* 1991 WL 834966 (Va. Cir. Ct.) (forum selection clause unenforceable when defendant had no contacts with Virginia).

OPINIONS BELOW

The opinion of the Alabama Supreme Court is not yet reported (A-1). The opinion of the Alabama Court of Civil Appeals is not reported (A-2 through A-3). The opinion of the Madison County Circuit Court is not reported (A-4 through A-10).

JURISDICTION

The judgment of the Alabama Supreme Court was entered on May 16, 2003. The jurisdiction of this Court rests on 28 U.S.C. § 1257. The decision below affirmed the decision of the Alabama Court of Civil Appeals, which upheld the trial court's dismissal of the case, and required that parties submit to the jurisdiction of the Virginia courts for resolution of any legal claims. The judgment below is therefore "final" for purposes of this Court's jurisdiction under § 1257.

Petitioners expressly raised below the questions presented in this petition, not only during oral argument in the trial court, but also in briefs filed with the Alabama Court of Civil Appeals, and in the Alabama Supreme Court.

The Alabama Supreme Court's dismissal of the appeal (based on alleged inadequacies in the state certiorari petition), cannot evade this Court's review by failing to discuss the questions raised in this appeal. *Chapman v. Goodnow's Adm'r.*, 123 U.S. 540, 548 (1887) ("If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects a claim, but avoids all reference to it, is as much against the right . . . as if it has been specifically referred to and the right directly refused.").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article VI, cl. 2:

This constitution, and the law of the United States which shall be made in pursuance to and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land,; and the judges in every state shall be bound thereby, anything in the constitution of laws of any state to the contrary notwithstanding.

Ala. Code 1975, § 8-19-1 (Alabama Deceptive Trade Practices Act)

This chapter shall be known and may be cited as the "Deceptive Trade Practices Act.

Ala. Code 1975, § 8-19-2

The public health, welfare and interest require a strong and effective consumer protection program to protect the interest of both the consuming public and the legitimate businessperson.

Ala. Code 1975, § 8-19-3(3)

Goods . . . includes . . . any *franchise*, license, distributorship, or other similar right, privilege or interest.

Ala. Code 1975, § 8-19-6

It is the intent of the legislature that in construing § 8-19-5 due consideration and great weight shall be given where applicable to interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a)(1) of the Federal Trade Commission Act, as from time to time amended.

Ala. Rule of Civil Procedure 12(h)(1)

A defense of lack of jurisdiction over the person, *improper venue*, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor include din a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course. All objections to venue shall be raised in a party's first responsive pleading.

STATEMENT OF THE CASE

1. *INTRODUCTION.*

The Alabama Supreme Court's ruling violates every major venue decision of this Court, ignores the three major caveats of *Bremen*, violates due process considerations (by permitting, among other things, a Rule 12 motion to be brought 4 years after the initial responsive pleadi1ng was filed), violates federal constitutional standards for the exercise of jurisdiction by *any* court (i.e., the fundamental requirement that "minimal contacts" be present in order for a court to have jurisdiction over a party, per *Hanson v. Denckla, infra*), and fails to accord any weight whatsoever to the public policy considerations implicit in the Alabama DTPA and *Bremen*.

The instant case further illustrates the need (per *Kubis, infra*) for implementation by this Court of a "presumption of invalidity" to govern forum selection

clauses in cases where viable consumer protection claims are raised.

In the instant case, Petitioners, Alabama citizens, sought to assert consumer protection claims under the Alabama DTPA, but were told those claims must be litigated in Virginia.

In the underlying suit, Petitioners had sued their former field manager, recruiters, site selection personnel, franchisor and subfranchisor for falsely representing various aspects of a Precision Tune auto repair franchise into which Petitioners invested, and lost, their life savings. In the Complaint filed in the Circuit Court of Madison County, Alabama, Petitioners asserted that Respondents grossly misrepresented the sales potential, profitability and capitalization needs of the business, in addition to overstating the extensiveness, quality and availability of field support, site selection expertise, and onsite training. Petitioners also alleged that at the time the aforesaid promises were made, the Respondents knew the training and support either (i) would not be available, (ii) would not be provided, or (iii) did not even exist. No material allegation set forth in the Complaint, either regarding venue or the merits, was ever contested. No answer was ever filed, even though at the time a venue change was requested, the parties were on the brink of trial. R:5-18 ("R" hereinafter refers to "Record Below").

In addition to the above-referenced breaches and negligence, the Complaint alleged that Respondents breached numerous oral and written promises made to

Petitioners during recruitment, improperly delayed site approval for over a year, and collectively and negligently caused the total loss of Petitioners' capital investment through gross mismanagement, managerial neglect and outright fraud. R:5-18.

For four years, the parties engaged in minimal discovery. Then, on the brink of trial, the Madison County Circuit Court postponed trial, and then entertained, and ultimately granted, an untimely Rule 12(h) motion from Respondents which belatedly challenged venue.

Though some litigants had never set foot in Virginia, and could not conceivably have been constitutionally subjected to jurisdiction there, the trial court sent all six parties and their claims to Virginia, a forum that was not only inconvenient, but had neither personal nor subject matter jurisdiction over the parties or controversy.

2. ***APPLICABLE LAW.***

The trial court's order of dismissal directly contravened substantive due process rights of the Petitioners (Mrs. Frakes had never set foot in Virginia, much less signed the agreement containing the forum selection clause), federal jurisdictional law, and this Court's rulings in *Bremen*, and progeny. Yet both the Alabama Court of Civil Appeals (J. Murdock, *dissenting*), and the Alabama Supreme Court (which dismissed the appeal on frivolous grounds), affirmed the trial court's dismissal. Neither appellate court issued a written opinion. Petitioners challenged the validity of the trial

court's ruling, both in oral argument before the trial court, and at each level of the Alabama appellate courts.

The United States Constitution directs and requires that the various state courts exercise jurisdiction over disputes that arise within their boundaries and, more importantly, that said courts adhere to the prior venue rulings of this Court (e.g., *Bremen*). In the instant case, the Alabama courts – at virtually every level – ignored the holdings and caveats of *Bremen* and *Hanson* and, consequently, issued a decision that directly controverts federal law. That decision must be vacated and remanded, with instructions.

The law in this area is clear. Because the state where the case was ultimately sent (Virginia), could not constitutionally exercise jurisdiction over four of the six parties sent there, dismissal was improper. Virginia did not have even "minimal contacts" with four of the six parties. In ruling Virginia was an appropriate forum, several boilerplate principles of federal jurisdictional law eluded the Alabama courts, including basic standards governing substantive due process, venue, and federal jurisdiction (e.g., the "minimum contacts" required to constitutionally sustain jurisdiction in any state or federal court). *Hanson v. Denckla*, 357 U.S. 235 (1958).

For these and other reasons mentioned below, a writ of certiorari should be issued to (a) correct the Alabama Supreme Court's erroneous affirmation of the trial court's dismissal, and (b) establish a "presumptive invalidity" for forum selection clauses offered as a basis for change of venue in consumer protection cases.

3. *FACTS MATERIAL TO CONSIDERATION.*

The salient facts of the instant are easily summarized. In 1994, Larry and Teresa Frakes were involved in a series of meetings and discussions wherein they were recruited to invest in a Precision Tune auto repair franchise by their neighbor William Grimaud, and by John A. Garies, Jr., a recruiter, manager and site evaluator for Grimaud Enterprises, Inc., the exclusive subfranchisor for Precision Tune franchises in northern Alabama. R:5-18, 211-215, 231-234, 246-253, 341-348.

In November of that same year, Larry (but not Teresa) Frakes signed a franchise agreement with Precision Tune, Inc. in Leesburg, Virginia. The Precision Tune agreement contained a clause specifying Virginia as the forum for resolving conflicts. R:311. Neither Mrs. Frakes, Garies, Grimaud, nor Grimaud Enterprises, Inc. were signators to any written agreement, though the latter three were each alleged to have made various false assurances and promises to Petitioners regarding the training and field support that would be provided, in order to induce the Frakes to invest in the franchise. R: 5-8.

For over a year after the agreement was signed, Precision Tune and Garies refused to approve a site for the Frakes' franchise, which was originally scheduled to be located in Huntsville, Madison County, Alabama (where the Frakes lived, and where suit was ultimately filed). In fact, Precision Tune rejected every single site request the Frakes made for the Huntsville area, and eventually approved a site in sparsely-populated Athens. R:236,341-345.

Soon after startup, Mr. and Mrs. Frakes discovered that the Respondents had, among other things, understated capitalization requirements, overstated profits and sales, and delivered inadequate advertising support. Shortly after the store opened, the Frakes began to seriously question the competency and quality of the field support being rendered, particularly when (a) a highway closure directly in front of the Frakes' store apparently eluded Precision Tune operatives, including Garies, during their so-called "highly-sophisticated" site-approval process, and (b) the Frakes' field manager cancelled the grand opening (because the base on the wheel balancer was a different color than the balancer itself). Because the Frakes were novice business people, Precision Tune's promises of extensive field support and training (purportedly the best in the industry), were integral components of the decision to invest. R:5-18,211-215,341-345.

In 1997, after the business failed, the Frakes filed a Complaint in the Madison County Circuit Court asserting claims under the Alabama DTPA, as well as various common law claims. The Alabama DTPA provides state attorney general supervision over pending litigation, restraining orders to halt deceptive practices, discovery procedures (including state attorney general subpoena power), a private right of action, and treble damages. *Ala. Code 1975, §§ 8-19-8, 8-19-9, 8-19-10* — all of which would be completely eviscerated by referring a DTPA case to a foreign forum.

In any event, Respondents waited four years after suit was filed and then, when trial was imminent, finally filed a Rule 12(h) motion requesting a change of venue. They did so even though they were aware of the forum selection clause from the beginning (the clause was in the parties' franchise agreement).

Respondents argued that their delay resulted from their reliance on ever-changing Alabama decisional law. This delay occurred despite the fact that (a) Ala. Rule of Civil Procedure 12(h) requires venue objections to be asserted in the first responsive pleading, and (b) at the time suit was filed, the Alabama Supreme Court had previously issued rulings in *Professional Insurance Corp. v. Sutherland*, 700 So.2d 347 (1997) and *Ex parte CTB, Inc.*, 782 So.2d 188 (2000), holding that forum selection clauses were *per se* enforceable. Even so, the Respondents waited over four years after *Sutherland*, and 10 months after *CTB*, before moving for a change of venue. This should have, but did not, bother the Alabama Supreme Court which, rather than consider the merits of the appeal, dismissed on the basis that the petition was non-conforming – a frivolous ruling that is inconsistent with the record below.

In that proceeding, the Alabama Supreme Court rejected Petitioners' first certiorari petition, and ordered Petitioners to file a second, ruling the first was non-conforming. Though the first petition was conforming, Petitioners nevertheless timely filed a second petition, only to have it struck down by the court, which then inexplicably reinstated the first.

Shortly thereafter, the Alabama Supreme Court promptly dismissed the first petition, purportedly on the basis that it did not comply with Ala. Sup. Ct. Rule 39. That court never stated, at any time during the proceeding, exactly what aspects of the initial petition were non-conforming. Moreover, prior to dismissal, the clerk of that court refused to provide counsel with an exemplary copy of a conforming brief.

4. ***RECORD BELOW.***

Venue determinations are necessarily fact-specific. In this case, even the evidence offered by the Respondents in the court below, reflects Virginia was not a proper forum, and undercuts the appellate rulings affirming the trial court's order of dismissal. In fact, every fact conceivably related to venue, points to Alabama.

For example, Respondents offered deposition testimony of Mr. Frakes which, ironically enough, completely contradicted Respondents' announced stance on venue. In that testimony, Mr. Frakes stated:

> "Well, I live in Madison, Alabama, and this entire concept for me revolved around business in Madison, Alabama. And of course Madison, Alabama, is in Madison County and the franchisee who owns the existing two [Precision Tune] centers in Huntsville had his franchise agreement predated Grimaud Enterprises' role as the area subfranchisor. It was not --- it was a different agreement." R:234.

Even the deposition questioning of defense counsel assumed the parties' relationship had significant contacts with Alabama, including: "When you say one for tota' population that was very difficult to meet you mean in the context of any site in Madison?" R:236.

Likewise, in Mr. Grimaud's deposition, the venue allegations of the Complaint were also confirmed, when he stated: "I opened my center in Florence in September 1994. ... I was 20 percent owner with management interest. . . . John Garies [owned 20 percent of the store]. . . . I believe it was right around March-April time frame I began contracting with Grimaud Enterprises on a contract basis to do shop visits with franchise stores in the [Madison/Florence] area." R:246.

Mr. Grimaud's duties for the company in the Huntsville area were then described as being to: "Visit the stores [in northern Alabama] and assist anyone that had a problem or anything that needed to be assisted with. I would provide them with any kind of information that they needed and assist them in problem areas. ... I [also] began doing site analysis and that sort of thing." Then, in response to a question about having discussions with the Frakes prior to them making an investment, Mr. Grimaud responded in the affirmative when asked if he did that, and if at that time Mr. Frakes was his neighbor. R:231,250. Mr. Grimaud goes on to testify that their [Alabama] meetings took place in the summer of 1994. R:251,252.

As can be readily seen, the record below is replete with numerous irrefutable factual material indicating Madison County was the proper venue, and Virginia an *improper* venue, including unrefuted allegations contained in the pleadings (including the Complaint, twice amended) deposition testimony, interrogatory responses and other factual information.

Despite the voluminous evidence in the record, the trial court, in derogation of every major venue decision previously issued by this Court, dismissed the case for improper venue, thereby forcing all six parties and their claims to Virginia.

5. ***ARGUMENT SUPPORTING ISSUANCE OF WRIT.***

In *Bremen*, this Court ruled that forum selection clauses were "presumptively valid," and should be upheld, *so long as they were fair, reasonable and not contrary to public policy.*

The ruling by the Alabama Supreme Court, affirming the trial court's dismissal and the Alabama Court of Civil Appeals' decision, violates all three major caveats annunciated in *Bremen*. *Bremen* makes it clear that such clauses should not be enforced when it would be patently unfair, unreasonable under the circumstances, or contrary to public policy (e.g., inconsistent with legislative intent as expressed in the Alabama DTPA).

Since issued in 1972, the basic ruling of *Bremen* has never been challenged, i.e., that forum selection clauses in commercial agreements are presumptively valid. However, rarely has this Court elaborated on the *Bremen* caveats, and those caveats are in need of definition, qualification and revision. This is especially true of what presumption, if any, is to be accorded to forum selection clauses brought in conjunction with consumer protection cases under state law.

The instant case bears little resemblance to the circumstances presented in *Bremen*. Unlike Bremen, several parties were exported to a forum with which they had absolutely no proven connection. So, in the first instance, the Alabama Supreme Court's decision stands in blatant defiance of *Bremen*. That is because, in the instant case, Virginia cannot constitutionally exercise jurisdiction over four of the six parties.

Secondly, unlike *Bremen*, enforcement of the forum selection clause vis-a-vis Mr. Frakes (the only Petitioner to sign the agreement containing the clause), is still fundamentally unfair and violative of public policy, insofar as the Alabama DTPA was specifically enacted to protect Mr. Frakes and other Alabama consumers from predatory marketing practices of out-of-state (or in-state) franchisors. *Ala. Code 1975, § 8-19-1, et seq.* This is a far cry from *Bremen*, where the clause was between wholly commercial

entities with relatively equal bargaining power and, more importantly, where there were no countervailing public policy interests involved. Here, on the other hand, there are significant public policy interests involved, i.e., the interest of the State of Alabama in enforcing a remedial statute intended to protect Alabama citizens from fraudulent marketing practices of various in-state (or out-of-state) franchisors. In such a case, there are clear public policy ramifications weighing heavily against exporting the action.

Another factor weighing heavily in favor of remand, is that all material events in the instant case (except, perhaps, the location of the signing of the contract) occurred in Alabama, not Virginia. This also evidences a blatant disregard of *Bremen*.

An additional factor weighing heavily in favor of Alabama being the preferred forum, is the principle of judicial economy, which expresses a strong disinclination against permitting piecemeal litigation of related claims between related parties. *See e.g., Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 26 (1960); *Steward v. Up North Plastics, Inc.*, 177 F.Supp.2d 953, 959 (USDC Minn. 2001) ; Wright & Miller, *15 Federal Practice and Procedure Juris. 2d*, § 3808 (Multiple Claims) (rev. 2002); *Ex parte Boshell*, 805 S.2d 675 (Ala. 2001).

Last, but not least, is the Alabama Supreme Court's neglect of its own rules and prior decisions, including Rule 12(h) (requiring venue objections to be raised in the first responsive pleading) and *Ex Parte Ben Acadia*, 566 So.2d 486 (1986) (requiring courts to exercise a careful, fact-based inquiry into any forum decision, based on appropriate factors). *See also, Ex parte Prudential Ins. Co. of America*, 721 So.2d 1135, 1139 (1998) (defendant must show, and record must demonstrate, that there exists a more appropriate forum outside the state); *MacPhail v. Oceaneering Intern., Inc.*, 170 F.Supp.2d 718 (S.D. Tex. 2001) (forum selection clause not enforceable when transferee forum could not likely exercise jurisdiction); *Cole v. Oasis Car Wash, Inc.*, 2002 WL 59410 (E.D. La. 2002) ("The forum selection clause cannot be applied to parties that were not parties to the agreement").

Although this Court would not ordinarily concern itself with a state's predilection to violate its own procedural rules, the alleged violation, at least in the instant case, also impacts the due process rights of the Petitioners, who were subjected to a belated and unsubstantiated venue challenge – a challenge that should have never been entertained, much less succeeded. All material facts in the record indicate the venue determination inferentially affirmed by the Alabama

Supreme Court was grossly incorrect, constituting wholesale abandonment of the principles and caveats annunciated in *Bremen* and *Hanson*.

REASONS FOR GRANTING THE PETITION

The Alabama Supreme Court's ruling abrogates every major venue decision of this Court, ignores the three major caveats of *Bremen,* violates due process considerations, ignores federal constitutional standards which are a necessary component of the exercise of jurisdiction by *any* court, and fails to accord any weight whatsoever to the public policy considerations implicit in the Alabama DTPA, and explicitly approved by this Court in *Bremen*. This case further illustrates the need (per *Kubis*) for a "presumption of invalidity" to govern forum selection clauses in cases where viable consumer protection claims are raised.

Never could the timing be more appropriate than now for a ruling on the "presumptive invalidity" of forum selection clauses in cases involving consumer protection claims. During the last 30 years, there has been a tremendous proliferation in the number of state consumer protection statutes enacted to protect victims of corporate fraud, including ordinary consumers lured into investing their life savings into various no-risk "business opportunities" and franchises.

Though this Court has given meaningful guidance over the years on most major venue issues regularly confronting lower courts, it has not defined to what extent the "public policy" considerations identified in *Bremen* should impact presumptions regarding the burden of proof in consumer protection cases where forum selection clauses are present. As a result, courts are exporting cases to foreign forums that, for any number of reasons, have no business being there.

This Court's historical guidance on venue issues has been critical to a disciplined evolution of venue principles and law. In fact, this Court's previous rulings have enabled lower courts to render venue decisions efficiently, accurately and routinely, in almost every case. Inexplicably, however, as the instant case illustrates, this Court's clear pronouncements of applicable venue rules are sometimes ignored, misinterpreted or misapplied. This can result in gross injustice to the parties, increase in confusion over the evolution of the *Bremen* caveats, and/or a detectable deterioration in the deference to this Court's rulings that lower courts are, without question, historically supposed to grant.

The instant case evidences why this Court's continued *and continuing* guidance over the evolution of *Bremen*, and associated venue questions, is indispensable. Since 1972, there has been little exposition on the three *Bremen* caveats, particularly in consumer protection cases.

For the reasons stated above, a "presumption of invalidity" should prevail in such cases, and a writ of certiorari should be issued.

Either way, this case provides a conspicuous example of forum analysis gone awry. Given the undisputed facts, this case simply does not belong in any state except Alabama. An order of remand by this Court, with instructions to reconsider the decision in light of *Bremen* , would suffice to correct a grievous injustice to the Petitioners. In any event, the case presents a prime opportunity for this Court to define to what extent public policy considerations, and remedial consumer protection statutes, should impact daily venue determinations throughout these United States.

CONCLUSION

The Commonwealth of Virginia – which cannot constitutionally exercise jurisdiction over four of the six parties to this action – is not an appropriate forum for this case.

Regardless, the three caveats of *Bremen,* particularly the "public policy" caveat, warrant further definition by this Court, at least with regard to the presumption to be accorded forum selection clauses in consumer protection cases. As Petitioners have explained above, such clauses should be declared "presumptively invalid" in cases where consumer protection claims are being asserted.

For the foregoing reasons, the Petition for Writ of Certiorari should be GRANTED.

Respectfully submitted this 14th day of August, 2003.

JAMES E. STARNES
2 E. Bryan Street
Suite 1500
Savannah, GA 31401
Ph. (912) 233-5700
Fax (912) 233-8999

Counsel for Petitioners

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Respondents

On Petition for Writ of Certiorari
To The Supreme Court of Alabama

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

JAMES E. STARNES
2 E. Bryan Street
Suite 1500
Savannah, GA 31401
Ph. (912) 233-5700

Counsel for Petitioners

11 PP

IN THE SUPREME COURT OF ALABAMA

May 16, 2003

1020856

Ex parte Lawrence W. Frakes and Teresa K. Frakes. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Lawrence W. Frakes and Teresa K. Frakes v. John Garies, William Grimaud, Grimaud Enterprises, Inc., and Precision Tune, Inc.) (Madison Circuit Court: CV-97-2126; Civil Appeals: 2010922).

CERTIFICATE OF JUDGMENT

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied for noncompliance with Rule 39 (d) (3), Alabama Rules of Appellate Procedure.

NO OPINION.

WOODALL, J. - Moore, C.J., and Houston, Lyons, and Johnstone, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 16th day of May, 2003

s/ Robert G. Esdale, Sr.

Clerk, Supreme Court of Alabama

FEB 14 2003

STATE OF ALABAMA - - JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS
OCTOBER TERM, 2002-2003

2010922

Lawrence W. Frakes and Teresa K. Frakes v. John Garies, William Grimaud, Grimaud Enterprises, Inc., and Precision Tune, Inc.
Appeal from Madison Circuit Court (CV 97-2126).

PITTMAN, Judge.

AFFIRMED. NO OPINION.

See Rule 53(a) (1) and (a) (2) (A), Ala. R. App. P.; Ex parte Boshell, 805 So. 2d 675 (Ala. 2001); Ex parte CTB, Inc., 782 So. 2d 188 (Ala. 2000); O'Brien Eng'g Co. v. Continental Machines, Inc., 738 So. 2d 844 (Ala. 1999); Ex parte R.B.Z., 725 So. 2d 257 (Ala. 1997); Ex parte Till, 599 So. 2d 871 (Ala. 1992); and Ex parte Ben-Acadia, Ltd., 566 So. 2d 486 (Ala. 1990).

Yates, P.J. , and Crawley and Thompson, JJ., concur.

Murdock, J., ***dissents.***

John H. Wilkerson, Jr., Clerk of the Court of Civil Appeals of Alabama, do hereby certify the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said court.

Witness my hand this 14th day of February, 2003

s/ John H. Wilkerson, Jr.

Clerk, Court of Civil Appeals of Alabama

IN THE CIRCUIT COURT
FOR MADISON COUNTY, ALABAMA

Civil Action No. CV97-2126-LWH

LAWRENCE W. FRAKES, and	)
TERESA K. FRAKES,	)
Plaintiffs,	)
	)
	)
v.	)
	)
JOHN GARIES, WILLIAM GRIMAUD,	)
GRIMAUD ENTERPRISES, INC., and	)
PRECISION TUNE, INC.,	)
Defendants.	)

AMENDED ORDER OF DISMISSAL

This cause comes before the Court on the Second Amended Motion to Dismiss of Defendant Precision Tune, Inc. ("Precision Tune") and the Second Amended Motion to Dismiss of Defendants John Garies ("Garies"), William Grimaud ("Grimaud") and Grimaud Enterprises, Inc. ("Grimaud Enterprises"). The Court having considered the motions, all evidence and other matters properly before the Court, app0licable legal authorities, and the arguments and presentation of counsel for the parties, is of the opinion that the Second

Amended Motion to Dismiss of Precision Tune and for Second Amended Motion to Dismiss of Garies, Grimaud and Grimaud Enterprises are due to be granted. Consistent therewith, the Court, in the exercise of its discretion, hereby makes the following findings and enters the following order:1. This action was instituted by the filing of the Complaint by Lawrence W. and Teresa K. Frakes, (the "Frakes") on October 31, 1997. The Frakes subsequently amended their original Complaint, filing an Amended Complaint and Second Amended Complaint on November 19, 1997, and May 13, 1998, respectively. In their original Complaint, the Frakes asserted claims against the named Defendants for fraud, breach of contract, civil conspiracy and claims under the Alabama Deceptive Trade Practices Act, *Ala. Code § 8-19-1, et seq. (1975).* These claims relate directly to and/or arise out of the Franchise Agreement executed by Lawrence W. Frakes in Leesburg, Virginia, at the corporate headquarters for Precision Tune, Inc., on November 30, 1994, and the alleged breach of that Agreement. (*See* Franchise Agreement attached as Exhibit "A" to Precision Tune's Second Amended Complaint) Paragraph 25.2 of the Franchise Agreement between Mr. Frakes and Precision Tune provides:

> **The parties agree that any action brought by either party against the other in any court, whether federal or state, shall be brought within the Commonwealth of Virginia in the judicial district in which**

> **the Franchisor has is principal place of business and do hereby waive all questions of personal jurisdiction or venue for the purpose of carrying out this provision.**

(*See* Franchise Agreement). Until July of 1997, such outbound forum selection clauses were not enforceable in Alabama. *See Professional Insurance Corp. v. Sutherland*, 700 So2d 1154 (Ala. 1996). In *O'Brien Engineering Co. v. Continental Machines, Inc.*, 738 So2d 884, 847 (Ala. 1999), the Alabama Supreme Court recognized that outbound forum selection clauses constituted clauses which deprived courts of their subject matter jurisdiction. On July 28, 2000, the Alabama Supreme Court altered its approach to outbound forum selection clauses, instructing courts that such clauses invoke considerations of venue, not subject matter jurisdiction, as previously determined by the Court. *See Ex parte CTB*, 2000 WL 1038169 (Ala. 2000).

2. The above-quoted forum selection clause is both valid and reasonable and, as such, is enforceable as a matter of law. The only evidence presented to the Court on the issues related to the forum selection clause constituted the evidence presented by Precision Tune. This evidence demonstrated that Lawrence W. Frakes acknowledged his agreement to the terms and conditions of the Agreement as well as the risks resulting from entering into this Agreement. Furthermore, the

evidence demonstrated that the chosen forum is not seriously inconvenient for several reasons, including the fact that the chosen forum constitutes the corporate headquarters of Precision Tune. In response to the evidence presented by Precision Tune, the Frakes failed to present any evidence in response to the Second Amended Petition to Dismiss filed on behalf of Precision Tune. Such deficiency in evidence included the absence of any evidence demonstrating that the outbound forum selection clause in question was affected by fraud, undue influence or overweening bargaining power. Furthermore, there is no evidence that the enforcement of the outbound forum selection clause would be unreasonable on the basis that the chosen forum would be serious inconvenient. Therefore, the Frakes failed to provide any evidence establishing the unreasonableness and/or unfairness of the forum selection clause in question. Accordingly, the Frakes' claims against Precision Tune are due to be dismissed on the basis that Madison County, Alabama, is not the proper venue for this action and any such action should be instituted in Loudown County, Virginia.

3. The Court also holds that the Frakes' claims against Grimaud Enterprises, Grimaud and Garies are due to be dismissed on the ground of *forum non conveniens*. Grimaud Enterprises, Grimaud and Garies presented substantial evidence establishing that Loudoun County, Alabama, constituted the situs of the Frakes' claims. The Frakes did not present any evidence

rebutting the evidence presented by Grimaud Enterprises, Grimaud and Garies. The Court recognizes that, because of the dismissal of Precision Tune form this action and the resulting burden upon the Frakes in maintaining two separate actions in two different venues, which arise out of the same transaction and occurrence, it would be less burdensome upon the Frakes to pursue their claims against all of the named defendants in one venue, Loudoun County, Virginia. It is in the best interest of the parties, witnesses and judicial economy that the parties litigate this action in Loudoun County, Virginia. Furthermore, Grimaud Enterprises, Grimaud and Garies have represented to the Court that they will not to object or raise the defenses of lack of jurisdiction, improper venue and/or statute of limitations upon the reassertion of the claims asserted in the present action in Loudown County, Virginia. These parties are therefore judicially estopped from doing so should an action be initiated in Loudown County, Virginia, reasserting the causes of action specifically contained in the present action, pending in Madison County, Alabama. Based upon the foregoing, the Frakes' claims against Grimaud Enterprises, Grimaud and Garies are due to be dismissed.

4. This Order is conditioned upon the agreement of Precision Tune, Grimaud Enterprises, Grimaud and Garies that they shall not object or raise the defenses of lack of jurisdiction, improper venue and/or statute of limitations to any specific causes of action asserted in the

venue of Loudown County, Virginia, which were brought against the named defendants in the present action pending in the Circuit Court for Madison County, Alabama. Nothing contained herein shall limit the right of Precision Tune, Grimaud Enterprises, Grimaud and Garies to object or raise any appropriate defense, including, without limitation, lack of jurisdiction, improper venue, statute of limitations, to any causes which were not specifically asserted by the plaintiffs in this present action. The waiver described in this paragraph shall be valid and enforceable for a period of 120 days form the date of this Amended Order of Dismissal. At any time more than 120 days from the date of this Amended Order of Dismissal, the waiver described herein above shall be null and void and unenforceable under the terms and conditions of this Amended Order of Dismissal.

5. The above-described waiver by Precision Tune, Grimaud Enterprises, Grimaud and Garies of the defense of statute of limitations shall be effective for the 120 days following the date of the entry of this Amended Order of Dismissal. Therefore, any and all causes of action filed by the Frakes within 120 days of the date of this Amended Order of Dismissal in a court of competent jurisdiction in Loudoun County, Virginia, which were also asserted in this action, shall not be subject to the defense of statute of limitations and Precision Tune, Grimaud Enterprises, Grimaud and/or Garies hereby waive any such defense. However,

should the Frakes assert any cause or causes of action against Precision Tune, Grimaud Enterprises, Grimaud and/or Garies in Loudoun County ,Virginia more than 120 days from the date of this Amended Order of Dismissal, then any such cause or causes of action asserted by the Frakes against Precision Tune, Grimaud Enterprises, Grimaud and/or Garies in such action shall be subject to the defense of statute of limitations, if applicable, and any waiver of such defense by Precision Tune, Grimaud Enterprises, Grimaud and/or Garies to any such cause or causes of action shall be null and void.

6. The Order of Dismissal entered by this Court on May 16, 2002, is hereby withdrawn. This Amended Order of Dismissal shall supercede the Order of Dismissal, previously entered in this matter.

It is, therefore, ORDERED, ADJUDGED, and DECREED that the Second Amended Motion to Dismiss of Defendant Precision Tune, Inc. and the Second Amended Motion to Dismiss of Defendants John Garies, William Grimaud and Grimaud Enterprises, Inc., are due to be, and are hereby, GRANTED, and final judgment is hereby entered against Plaintiff dismissing *without prejudice* each of the counts and claims for relief asserted in the Plaintiff's Complaint, Amended Complaint, and Second Amended Complaint.

DONE and ORDERED this the 22nd day of May, 2002.

s/Laura W. Hamilton
Honorable Laura W. Hamilton
Circuit Judge Presiding

(3)

No. 03-265

Supreme Court, U.S.
FILED
SEP 19 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TERESA AND LARRY FRAKES,

Petitioners,

v.

PRECISION TUNE AUTO CARE, INC., GRIMAUD ENTERPRISES, INC., JOHN GARIES, and WILLIAM GRIMAUD,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF IN OPPOSITION FOR RESPONDENTS

RODERIC G. STEAKLEY
Counsel of Record
WILLIAM R. LUNSFORD
SIROTE & PERMUTT, P.C.
305 Church Street, Suite 800
P.O. Box 18248
Huntsville, Alabama 35804-8248
(256) 536-1711
Counsel for Respondents
Precision Tune Auto Care, Inc., Grimaud Enterprises, Inc., John Garies and William Grimaud

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether the denial of the Frakes' petition for writ of certiorari to the Supreme Court of Alabama constitutes a decision subject to this Court's certiorari review?

2. Whether the Virginia court possessed personal jurisdiction over the parties to this action?

3. Whether the enforcement of the forum selection clause complied with this Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)?

4. Whether this Court should reverse its decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) and adopt a presumption that forum selection clauses are *per se* invalid as suggested by Petitioners?

5. Whether Precision Tune, Inc., Grimaud Enterprises, Inc., John A. Garies, Jr. and William Grimaud timely raised their venue-related objections?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents respectfully submit this Corporate Disclosure Statement.

Respondent Precision Tune, Inc. which is now known as Precision Tune Auto Care, Inc. is a subsidiary of WE JAC Corporation. WE JAC Corporation is a subsidiary of Precision Auto Care, Inc., which is publicly traded on NASD over-the-counter market.

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BRIEF IN OPPOSITION FOR RESPONDENTS

Respondents Precision Tune Auto Care, Inc. (hereinafter "Precision Tune"), Grimaud Enterprises, Inc. (hereinafter "Grimaud Enterprises"), John A. Garies, Jr. (hereinafter "Garies") and William Grimaud (hereinafter "Grimaud") respectfully submit that the Petition for Writ of Certiorari (hereinafter "Pet.") filed by Petitioners is due to be denied.

JURISDICTION

As discussed in greater detail herein below, the May 23, 2003, opinion of the Alabama Supreme Court does not constitute a reviewable decision under 28 U.S.C. §1257 and, therefore, the Petition for Writ of Certiorari filed by Petitioners is due to be denied.

STATEMENT OF THE CASE

In early- to mid-1994, Petitioner Larry Frakes initiated communications with Precision Tune regarding the possibility of opening a Precision Tune automotive service center in North Alabama.[1] Respondent Precision Tune[2] is a Virginia corporation with its principal place of business in Leesburg, Loudoun County, Virginia and is in the business

[1] The statement in the Frakes' Petition that they were "recruited" by Precision Tune is both misleading and inaccurate because the Frakes initiated contact with Precision Tune and actively pursued the opportunity to open a Precision Tune automotive service center. (Pet. at 10)

[2] "Precision Tune Auto Care, Inc." was formerly known as "Precision Tune, Inc."

of franchising "automotive service businesses." Soon after initiating contact with Precision Tune, Mr. Frakes attended two (2) seminars held by Precision Tune regarding franchising opportunities. According to Mr. Frakes, the first substantive contact with Precision Tune occurred when he attended a franchising seminar offered in Houston, Texas ("Texas seminar"), where representatives of Respondent Grimaud Enterprises, an area subfranchisor of Precision Tune, made a presentation regarding franchising opportunities. One presenter at the Texas seminar was Respondent John A. Garies, Jr.

Shortly after the Texas seminar, Mr. Frakes attended a second seminar at Precision Tune's corporate headquarters in Leesburg, Virginia ("Virginia seminar"), where he reached his final decision to enter into the franchisor-franchisee relationship with Precision Tune. Mr. Frakes recalled that the presentations at the Texas seminar and the Virginia seminar were not "substantially different." The Frakes concede that Mr. Frakes executed the Franchise Agreement at the Virginia seminar in Leesburg, Virginia on November 30, 1994. In the Franchise Agreement, Mr. Frakes acknowledged that Precision Tune's principal place of business constituted Leesburg, Virginia, and specifically agreed in the Franchise Agreement:

> This Agreement takes effect upon its acceptance and execution by [Mr. Frakes] in Virginia and shall be interpreted and construed under the laws thereof, which laws shall prevail in the event of any conflict of law . . .
>
> . . . *The parties agree that any action brought by either party against the other in any court, whether federal or state, shall be brought within the Commonwealth of Virginia in the judicial*

> *district in which [Precision Tune] has its principal place of business and do hereby waive all questions of personal jurisdiction or venue for the purpose of carrying out this provision.*

(Italics supplied) During the five (5) business days prior to the execution of the Franchise Agreement, Mr. Frakes reviewed the Agreement and consulted with his legal counsel who reviewed it with him.

After the Precision Tune automotive center established by the Frakes in Athens, Alabama failed to yield the financial return desired by the Frakes, they initiated this action in the Circuit Court for Madison County, Alabama (hereinafter the "trial court"), on November 14, 1997, asserting claims on behalf of both of them for breach of contract (based on the Franchise Agreement), fraud, civil conspiracy and a claim under the Alabama Deceptive Trade Practices Act, *Ala. Code* § 8-19-15 (1975). The defendants named in the original Complaint were: Precision Tune (a Virginia corporation), Grimaud Enterprises (a South Carolina corporation) and Grimaud (a resident of Madison County, Alabama). Garies (a resident of South Carolina) was subsequently added as a defendant.

The claims asserted in the Frakes' Complaint and subsequent amended pleadings allegedly arose out of two separate nucleuses of fact: (1) the alleged breach of the Franchise Agreement, and (2) alleged misrepresentations made to the Frakes principally during the course of the Texas and Virginia seminars.

At the outset of this action, each of the Respondents filed separate Motions to Dismiss, asserting various valid and substantiated bases for the dismissal of the Frakes' claims. Despite requests from Respondents to do so, the

trial court did not rule on these Motions to Dismiss and Respondents were forced to participate in limited discovery.[3]

On June 19, 1998, the Frakes' out-of-state counsel (who was, at the Frakes' direction, acting as "lead counsel"[4]) filed his application to appear *pro hac vice*. This application revealed a disciplinary proceeding which was pending against him before the Oregon Supreme Court. At the Frakes' request, the trial court postponed its decision regarding the *pro hac vice* admission of Frakes' out-of-state lead counsel pending final determination by the Oregon Supreme Court. As courtesy to the Frakes and their out-of-state counsel, Respondents agreed to the placement of this case on inactive status pending resolution of counsel's disciplinary proceedings. On September 14, 2000, the Oregon Supreme Court filed its opinion suspending Frakes' then out-of-state counsel "from the practice of law for 13 months." *In re Conduct of Brandt*, 10 P.3d 906 (Or. 2000). Sometime thereafter, this decision was brought to the trial court's attention, and on November 17, 2000, the trial court denied the application.

The trial court placed this case on the administrative docket on January 17, 2001, and ordered the parties to mediation. The Frakes delayed until May 1, 2001, before

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[3] Unlike the *Federal Rules of Civil Procedure*, a party is not excused under the *Alabama Rules of Civil Procedure* from responding to written discovery and deposition notices during the pendency of a motion to dismiss under Rule 12 of the *Alabama Rules of Civil Procedure*.

[4] Out-of-state counsel have always been designated to defendants as "lead counsel."

obtaining another out-of-state attorney to act as "lead counsel," thus forcing the case into an "inactive" status from June 19, 1998, until May 1, 2001. After this case was removed from the administrative docket, Precision Tune filed its Second Amended Motion to Dismiss (the original motions had not been ruled upon), requesting that the Court enforce the valid forum selection clause contained in the Franchise Agreement between Mr. Frakes and Precision Tune and require that this matter be dismissed and/or transferred to the mutually agreed upon forum of Virginia. After Precision Tune moved to dismiss this action on the basis of the forum selection clause, Grimaud Enterprises, Grimaud and Garies filed their Second Amended Motion to Dismiss, asserting that, pursuant to the doctrine of *forum non conveniens*, Virginia constituted the most convenient forum in which the parties should litigate this action.

At the Frakes' request, the first hearing on the pending motions to dismiss was postponed approximately two (2) months. The day before the second scheduled hearing, the Frakes filed a response to Respondents' pending motions, but **the Frakes never submitted any evidence in opposition to Respondents' motions prior to this hearing.** After this second hearing, the trial court entered an order enforcing the forum selection clause in the Franchise Agreement as to Precision Tune and dismissing *without prejudice* the Frakes' claims against Grimaud Enterprises, Grimaud and Garies on the basis of *forum non conveniens*. The trial court's dismissal of this action was conditioned upon Respondents' waiver of any objections as to venue, jurisdiction and statute of limitations for a period of one hundred twenty (120) days, which was agreed to by Respondents.

The Frakes appealed the trial court's dismissal of this action to the Alabama Court of Civil Appeals. After the parties submitted their respective briefs to the Alabama Court of Civil Appeals, on February 14, 2003, the Court of Civil Appeals affirmed without opinion the decision of the trial court. The Frakes then filed a petition for writ of certiorari and supporting brief to the Alabama Supreme Court pursuant to Rule 39 of the *Alabama Rules of Appellate Procedure*. Soon thereafter, the Frakes were notified that their Petition and brief failed to comply with the form requirements set forth in *Alabama Rule of Appellate Procedure* 39 and were provided with an opportunity to submit conforming documents. Seizing upon what they perceived to be an opportunity to revise and expand their petition and brief, the Frakes submitted a revised petition and brief which included additional substantive arguments not contained within their original petition and brief. The addition of these substantive arguments was in direct violation of Rule 32(c) of the *Alabama Rules of Appellate Procedure*, which allows for the submission of a conforming document so long as the party submitting the conforming document "in no event . . . add[s] any substantive material" to the argument asserted therein.

In response to this violation of Rule 32(c) of the *Alabama Rules of Appellate Procedure*, Respondents moved to dismiss the Frakes' petition and brief. On May 16, 2003, the Alabama Supreme Court released its decision in this case, concluding:

> The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied **for noncompliance with Rule 39(d)(3), Alabama Rules of Appellate Procedure.**

(Emphasis supplied) The Frakes now request this Court to exercise its discretionary certiorari jurisdiction to review the propriety of the Alabama Supreme Court's decision, even though it did not address the merits of the Frakes' contentions due to their failure to comply with Alabama's appellate rules.

SUMMARY OF REASONS FOR DENYING THE WRIT

Though the Frakes' Petition is replete with allegations of error by the trial court, the Alabama Court of Civil Appeals and the Alabama Supreme Court, it is devoid of any legal authority or evidence which supports any of the alleged errors identified by the Frakes. Pursuant to 28 U.S.C. § 1257, the statutory basis for this Court's certiorari jurisdiction, the Frakes' Petition is due to be denied because it fails to raise a substantial federal question which is necessary to the resolution of this case, and which would warrant the Court exercising its discretion in this regard. The Alabama Supreme Court affirmed the decision of the lower courts based not upon the merits of this case, but *solely* upon the Frakes' failure to comply with the *Alabama Rules of Appellate Procedure*. Therefore, the issues which Petitioner seeks to have this Court address were not necessary to affirm the decisions below.

Even if the Frakes had complied with these procedural rules, the alleged decision by the Alabama Supreme Court provides no basis for this Court to grant certiorari. The liberties which Petitioners take with the record below in presenting and arguing their Petition are extraordinary. Petitioners failed to introduce any evidence at the trial court level to support their positions and alleged

"facts" now argued on appeal, as specifically found by the trial court in its Amended Order of Dismissal, and affirmed by the Alabama Court of Appeals. In their Petition, the Frakes state that "[v]enue determinations are necessarily fact-specific." (Pet. at 13) Yet, they made no factual record before the trial court to support their position.

Further, Petitioners' jurisdictional and venue arguments lack merit. Larry Frakes agreed to submit to the jurisdiction of the Virginia courts (Precision Tune's principal place of business) by virtue of a valid and enforceable forum selection clause, which was both fair and reasonable under the standards dictated by this Court in *M/S Bremen*. Mrs. Frakes sought recovery for breach of the Franchise Agreement, even though she was not a signatory to it. She may not claim its benefits without submitting to its requirements. Furthermore, she may voluntarily submit to the jurisdiction of the courts in Virginia by initiating a suit there. All remaining Respondents other than Precision Tune were dismissed based upon the doctrine of *forum non conveniens*, and voluntarily consented to the jurisdiction of the Virginia courts. Petitioners do not directly challenge the trial court's *forum non conveniens* ruling (the words *forum non conveniens* do not even appear in their Petition). Rather, they argue incorrectly that no jurisdiction can be obtained in Virginia over these defendants. The voluntary consent to jurisdiction in Virginia by the defendants was effective to confer jurisdiction upon the Virginia court. To achieve their purposes, Petitioners invite this Court to undertake a radical reinterpretation of *M/S Bremen* and its progeny to hold that forum selection clauses in all franchise agreements and any agreement that might be involved in a "consumer protection case" be held to be presumptively invalid. The impact of such a

change would be enormous, and should be rejected. Finally, because the venue-related objections of Respondents were asserted in their first responsive pleading in compliance with Ala. R. Civ. Proc. 12(h), these objections were timely and properly granted. Accordingly, the Petition for Writ of Certiorari is due to be denied.

REASONS FOR DENYING THE WRIT

I. The Alabama Supreme Court did not render a decision on the merits of the Frakes' Petition for Writ of Certiorari.

In attempting to challenge the affirming decision of the Alabama Court of Civil Appeals, the Frakes filed a Petition for Writ of Certiorari with the Alabama Supreme Court, which failed to conform with the requirements set forth in Rule 39 of the *Alabama Rules of Appellate Procedure*. After being notified of the nonconforming nature of their Petition, the Frakes seized on that opportunity to rewrite and improperly supplement the arguments contained therein. For this reason, the Alabama Supreme Court did not address the merits of the Frakes' petition, but rather "denied [their petition] for noncompliance with Rule 39(d)(3), Alabama Rules of Appellate Procedure." In their Petition, the Frakes acknowledged, "the Alabama Supreme Court's dismissal of the appeal [was] based on alleged inadequacies in the state certiorari petition." (Pet. at 4) In a subsequent provision, the Frakes admitted that "the Alabama Supreme Court . . . rather than consider the merits of the appeal, [but] dismissed [their state petition]

on the basis that the petition was non-conforming . . . " (Pet. at 12)

The Alabama Supreme Court did not issue an opinion on the merits of this action, and affirmation of the Alabama Court of Civil Appeals' decision by the Alabama Supreme Court on a procedural basis does not substitute for one. As the Alabama Supreme Court has noted, "[n]oncompliance with Rule 39(k) [of the *Alabama Rules of Appellate Procedure*] prevents review by [the Alabama Supreme] Court where the intermediate appellate court has passed judgment with no opinion." *Ex parte Jackson*, 551 So.2d 304 (Ala. 1989) (relying upon *Ex parte Save our Streams, Inc.*, 541 So.2d 549 (Ala. 1989)). In the case of *Ex parte Hoffman*, the Alabama Supreme Court concluded that, because the petitioner's petition for writ of certiorari "fail[ed] to comply with the requirement of Rule 39(k), . . . this Court [had] no alternative but to deny [the] petition." 493 So.2d 387 (1986). In denying the petition for writ of certiorari in *Hoffman*, the Alabama Supreme Court instructed that its denial of the petition should not be construed "to suggest that petitioner would have won on the merits of his claim had he complied with the rule, only that this Court will not review the merits of his claim because of his failure to comply with the requirements of this Court's rules." *Id.* at 387. As indicated by these decisions, the Alabama Supreme Court's denial of the Frakes' petition was not intended and should not be construed as a decision on the merits of the underlying action.

Rule 10, as adopted by this Court, enumerates certain categories of decisions which may trigger "for compelling reasons" this Court's certiorari jurisdiction. The two primary categories at issue in this action are (1) decisions

by "a state court of last resort" which decided an important federal question that conflicts with a prior decision of another such state court, a federal court of appeals or this Court or, (2) a decision that constitutes an issue of first impression regarding federal law. Though this Rule is not a mandatory listing of all circumstances warranting the exercise of this Court's certiorari jurisdiction, 28 U.S.C. § 1257 provides the statutory basis for this Court's jurisdiction over final judgments and/or decrees entered by the highest court of a state. Section 1257 reiterates the types of claims identified in Rule 10 which are subject to certiorari review. Throughout the past, this Court has offered guidance in the application of these standards for its certiorari jurisdiction.

As this Court wrote in *Braxton v. United States*, 500 U.S. 344, 347, 111 S.Ct. 1854, 1857, 114 L.Ed.2d 385 (1991), "[a] principle purpose for which we use our certiorari jurisdiction ... is to resolve conflicts among the United States Court of Appeals and state courts concerning the meaning of provisions of federal law." Pure common sense leads to the conclusion that, in order for a "conflict" to arise for purposes of certiorari, a state court must address some aspect of federal law. Accordingly, a decision by a state court which rests upon valid state law grounds cannot serve as the basis for certiorari review by this Court. *See e.g. Lee v. Kemna*, 534 U.S. 362, 375, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002) (citations omitted) (instructing, "[t]his Court will not take up a question of federal law presented in a case if a decision of the state court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment ... [and this] rule applies with equal force whether the state-law ground is substantive or procedural"); *Fox Film*

Corp. v. Muller, 296 U.S. 207, 210, 56 S.Ct. 183, 80 L.Ed. 158 (1935) (concluding, "where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment); *see also Chapman v. Crane*, 123 U.S. 540, 548, 8 S.Ct. 211, 215, 31 L.Ed. 235 (1887). In light of the venue issues raised by the Frakes in their Petition, it is also worthy of noting that this Court has previously recognized the independence of state courts to dictate their own venue considerations. *See Burlington Northern Railroad Co. v. Ford*, 504 U.S. 648, 651, 112 S.Ct. 2184, 2186, 119 L.Ed.2d 432 (1992) (writing, "[t]he forum preferable to one party may be undesirable to another, and the adjustment of such warring interest is a valid state concern").

This Court has held on numerous occasions that the refusal of a highest court of a state to address certain issues on appeal does not provide a sufficient basis for this Court to review an alleged conflict with federal law not raised and/or addressed before the state courts. *See e.g. Yee v. City of Escondido, California*, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 150 (1992). This Court has previously refused to engage in a certiorari review of a decision rendered by a state court because of the failure of a petitioner to properly present his or her claim to the state court. In the case of *Hammerstein v. Superior Court of California*, 341 U.S. 491, 491, 71 S.Ct. 820, 821, 95 L.Ed. 1135 (1951), this Court wrote that it possessed "no jurisdiction to review the proceedings" before the Superior Court of California due to the petitioner's "failure to utilize the proper channel of review, namely, his failure to appeal from the default judgment." Thus, a party's failure to

comply with the specific procedural requirements before a state court necessary to the adjudication of the alleged issue of federal law precludes certiorari review by this Court.

The Frakes' failure to comply with Rule 39(d)(3) of the *Alabama Rules of Appellate Procedure* is undisputed. This failure precluded the Alabama Supreme Court from addressing the merits of the Frakes' arguments on appeal. Absent such a decision on the merits, the Alabama Supreme Court's decision cannot conflict with existing federal law and, therefore, cannot serve as the basis for certiorari jurisdiction. To grant certiorari in the present instance would excuse noncompliance with the procedural rules of the state appellate courts and assume a "conflicting" federal basis for action, when none in fact exists. In the past, this Court has indicated its hesitancy to render a decision which effectively "undercut[s] the state's ability to enforce its procedural rules." *Engle v. Isaac*, 456 U.S. 107, 129, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). Based upon the foregoing, the Frakes' Petition for Writ of Certiorari is due to be denied. Despite the fact that this Court does not possess certiorari jurisdiction in this case, Respondents will provide a full response to all of the issues raised in the Frakes' Petition.

II. Virginia courts could have constitutionally exercised personal jurisdiction over the parties to this action.

On five (5) separate occasions, the Frakes argue in their Petition that Virginia cannot "constitutionally" exercise jurisdiction over four of the six parties in this action. Much like other aspects of their Petition, the Frakes did not provide any legal authority for this

argument. Notably, the Frakes never identified which four parties they are referring to or the basis upon which the claims asserted by or against these four parties were dismissed. The claims asserted by Teresa Frakes[5] and the claims asserted against Grimaud Enterprises, Grimaud and Garies were dismissed *without prejudice* on the basis of *forum non conveniens*.[6]

Alabama's statutory *forum non conveniens* provision, *Ala. Code* § 6-5-430 (1975) expressly authorizes dismissal on the basis of *forum non conveniens* when it is "continued upon the . . . defendants . . . consent[ing] to jurisdiction in the identified forum." Pursuant to this provision, the dismissal of these claims was expressly conditioned upon Grimaud Enterprises, Grimaud and Garies consenting to jurisdiction in Virginia for a period of one hundred twenty (120) days from the date of dismissal.

Petitioners completely confuse and mischaracterize the jurisdiction issues in this case. They make arguments

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[5] Though the Frakes allege in their Petition that "Mrs. Frakes had never set foot in Virginia, much less signed the agreement containing the forum selection clause," she asserted a claim for breach of contract based upon the Franchise Agreement which contains the mandatory venue and jurisdictional provisions against the Respondents in the underlying action. In effect, Teresa Frakes is now attempting to distance herself from the Franchise Agreement and the enforceable forum selection clause. Had the trial court enforced the forum selection clause against Teresa Frakes, such a result would have been consistent with her claim for breach of contract based upon the Franchise Agreement.

[6] Petitioners do not directly challenge the trial court's *forum non conveniens* ruling (the words *forum non conveniens* do not even appear in their Petition). Rather, they argue incorrectly that no jurisdiction can be obtained in Virginia over these defendants.

and cite cases which are designed to protect defendants who are forced to defend, against their will, in a forum with which neither they nor the basic issues of the case have minimal contacts. To the contrary, in this case, all defendants have expressly consented after the dispute arose to *in personam* jurisdiction in Virginia, the place of incorporation and principal place of business of Precision Tune. Further, it was to Virginia that Mr. Frakes voluntarily traveled to execute the contract, and receive the "representations" upon which *both* Mr. and Mrs. Frakes base claims.

The vast weight of legal authority demonstrates that parties can consent to personal jurisdiction in state court. In the case of *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 2105, 72 L.Ed.2d 492 (1982), this Court recognized that, though a court could not obtain subject matter jurisdiction by consent of the parties, the parties could consent to personal jurisdiction in a given court. Specifically, this Court wrote, "[b]ecause the requirement of personal jurisdiction represents, first of all, an individual right, it can, like other rights, be waived. *Id.* at 703, 102 S.Ct. at 2105, 72 L.Ed.2d 492. Based upon *Insurance Corp. of Ireland*, Mrs. Frakes, Grimaud Enterprises, Grimaud and Garies can "constitutionally" consent to personal jurisdiction in Virginia.

Courts in both Alabama and Virginia have also recognized that a litigant may consent to personal jurisdiction in a particular venue. *See e.g. Foster v. Foster*, 709 So.2d 1301 (Ala. Civ. App. 1998); *Victore Insurance Co. v. Ross Neely Systems, Inc.*, 757 So. 2d 473 (Ala. Civ. App. 2000) ("Personal jurisdiction can be intentionally waived."); Rule 12, *Alabama Rules of Civil Procedure*; *Lee v. Lee*, 2002 WL

1902629 (Va. App. 2002); *Mahoney v. Mahoney*, 2001 WL 213999 (Va. App. 2001); *Dials v. Lee's Hill Partnership*, 1996 WL 1065662 (Cir. Ct. of Spotsylvania County, Va. 1996). As one commentator on Virginia civil procedure recently wrote, the exercise of *in personam* jurisdiction by Virginia courts may exist or occur by a defendant's "voluntary appearance in court submitting to the court's jurisdiction." *Bryson on Virginia Civil Procedure*, § III-B-1 (2001). Likewise, Mrs. Frakes may submit to such jurisdiction by asserting her claims there.

The central authority which the Frakes allegedly rely upon in arguing that a Virginia court did not possess personal jurisdiction over Mrs. Frakes, Grimaud Enterprises, Garies and Grimaud is the case of *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 283 (1958). Notably, the *Hanson* decision was rendered over a decade prior to this Court first recognizing the enforceability of out-bound forum selection clauses. In *Hanson*, this Court reversed the decision of the Florida Supreme Court in which the Florida court determined that it possessed jurisdiction over the claims in question. *Id.* In reversing the Florida Supreme Court's decision, this Court's analysis began with the fundamental tenet of *International Shoe* that "a defendant may not be called upon to [defend against claims in a foreign tribunal] . . . unless he has the 'minimal contacts' with that State that are prerequisite to its exercise of power over him. *Id.* at 251 (citations omitted). It is this very principle which the Frakes contend was violated by the alleged decision of the Alabama Supreme Court.

The issue with regard to the exercise of personal jurisdiction by a Virginia court in this case is not "minimum contacts," but consent as discussed above. The

consent of Defendants and the Frakes to personal jurisdiction in Virginia is not constitutionally offensive and does not violate this doctrine. As to Teresa Frakes, she wishes to convince this Court to treat her as a defendant when, in fact, the trial court and the Alabama Court of Civil Appeals determined that Mrs. Frakes' claims should, as a matter of convenience and judicial economy, be tried along with the claims of her husband, which allegedly arose out of the same alleged facts and circumstances. Accordingly, *Hanson*'s mandate with regard to minimum contacts has no application in the present case.

The convenience of Virginia as the forum for this action only arose when the trial court enforced the valid and enforceable forum selection clause and instructed Mr. Frakes that his claims must be pursued in Virginia. The doctrine of *forum non conveniens* was implemented to prevent a situation where, upon the enforcement of the forum selection clause, Mr. Frakes' claims proceed in Virginia while Mrs. Frakes' claims, which are based upon the same alleged facts and circumstances, continue in Alabama. To apply in this manner the *forum non conveniens* doctrine would ultimately result in negation of the doctrine of *forum non conveniens*, forcing two separate jurisdictions to bear the costs of administering almost identical actions. This result is clearly unacceptable. Based upon the foregoing, the trial court properly exercised its discretion and dismissed the claims asserted by the Frakes against Grimaud Enterprises, Grimaud and Garies pursuant to the doctrine of *forum non conveniens*.

III. The enforcement of the forum selection clause set forth in the Franchise Agreement complied with this Court's decision in *M/S Bremen*.

In June of 1972, this Court released its opinion in *M/S Bremen v. Zapata Off-Shore Co.*, in which this Court for the first time recognized the enforceability of outbound forum selection clauses. 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). In reaching this landmark decision, this Court reasoned, "[t]he choice of . . . forum was made in an arms-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts." *Id.* at 13, 92 S.Ct. at 914. Recognizing the importance of this decision, the Alabama Supreme Court relied upon *M/S Bremen* in validating forum selection clauses for the first time, incorporating this Court's instructions that "forum selection clauses 'are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances.'" *Professional Ins. Corp. v. Sutherland*, 700 So.2d 347, 350 (Ala. 1997).[7] The Alabama Supreme Court also instructed in a decision subsequent to *Sutherland*, that forum selection clauses will not be enforced when a party demonstrates that:

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[7] In a desperate attempt to concoct some basis for this Court to assert jurisdiction over this action, the Frakes go as far as leading this Court to believe that the cases of *Professional Insurance Corp. v. Sutherland*, 700 So.2d 347 (1997) and *Ex parte CTB, Inc.*, 782 So.2d 188 (2000) recognize that "forum selection clauses were *per se* enforceable." At no point has the Alabama Supreme Court ever held that such clauses were "per se" enforceable.

> either (1) the enforcement of the forum selection [clause] would be unfair on the basis that the [contract was] affected by fraud, undue influence, or overweening bargaining power or (2) that enforcement would be unreasonable on the basis that the chosen . . . forum would be seriously inconvenient for the trial of the action.

Ex parte Northern Capital Resource Corp., 751 So.2d 12, 14 (Ala. 1999 (citations omitted). In *M/S Bremen*, this Court also instructed that one indicia of unreasonableness precluding enforcement of a forum selection clause is whether "enforcement would contravene a strong public policy of the forum in which suit is brought." 407 U.S. at 15, 92 S.Ct. at 1916, 32 L.Ed.2d 513. Hence, absent evidence of the foregoing, *M/S Bremen*, which the Frakes herald as the principal authority upon which they base their analysis of forum selection clauses, requires enforcement of the forum selection clause at issue in this case.

The Frakes exclude from their Petition any mention of the fact that Precision Tune was the only Respondent dismissed from the underlying lawsuit on the basis of the forum selection clause. Before the trial court, Precision Tune presented evidence demonstrating the fairness and reasonableness of the forum selection clause in question. In contrast, as the trial court specifically found, the Frakes did not present any evidence to the trial court and, therefore, did not even attempt to overcome the presumption of validity applicable to forum selection clauses as adopted in *M/S Bremen*. (Pet. App. at 7)

The Frakes concede, as they must, the existence of the forum selection clause within the Franchise Agreement, but argued to the trial court and the Court of Civil Appeals

and now to this Court that they are entitled to completely nullify this provision. Taking into account the guidance offered by this Court in *M/S Bremen* regarding the enforcement of forum selection clauses and the facts of this case, it is evident that the enforcement of the forum selection clause in the Franchise Agreement did not contravene this Court's instructions.

Mr. Frakes sought out Precision Tune, not vice versa, for the purpose of purchasing and operating a franchise. Mr. Frakes had the Franchise Agreement reviewed by his own legal counsel. Mr. Frakes journeyed to Texas and Virginia to Precision Tune's corporate headquarters to obtain information, upon which he based his claims of fraud, and, while in Virginia, executed the Franchise Agreement. In clear and unambiguous terms, the forum designated in the Franchise Agreement's forum selection clause required the Frakes to bring suit in Virginia, Precision Tune's state of incorporation and principal place of business. There is no evidence that any question was ever raised by Frakes or his legal counsel concerning the forum selection clause until Precision Tune first attempted to enforce this provision of the Franchise Agreement.

Mr. Frakes was fully capable of understanding its clear import and there was no evidence that he did not comprehend the implications and consequences of the provisions within the Franchise Agreement. Mr. Frakes represented in the Franchise Agreement that he "read and understood" the Franchise Agreement and had "ample time and opportunity to consult with advisors of [his] own choosing about the potential benefits and risks of entering into this Agreement." At no time have the Frakes maintained or presented evidence that Mr. Frakes was confused or misled to the forum selection clause. There was no

evidence presented to the trial court demonstrating that Precision Tune coerced or forced Mr. Frakes into entering into this franchisee-franchisor relationship with Precision Tune. In fact, the only evidence before the trial court demonstrates that Mr. Frakes actively pursued the establishment of this relationship, received the Franchise Agreement five (5) business days before executing the Agreement and consulted with legal counsel before executing the Agreement. This evidence negated any "allegation" that Mr. Frakes' execution of the Franchise Agreement was "affected by fraud, undue influence, or overweening bargaining power," and led the trial court to the appropriate conclusion that the presumption of validity of the forum selection clause should remain intact.

In forcing Mr. Frakes to honor the terms and conditions of his agreement with Precision Tune, the trial court also recognized that any alleged inconvenience resulting from this action proceeding in Virginia did not differ from the inconvenience of this matter proceeding in Alabama. Only one of the Respondents in this action resides in Alabama. Throughout this case, the Frakes have relied upon out-of-state counsel whose office is located in Savannah, Georgia. It is not surprising that Precision Tune's witnesses and relevant documents would be located at its headquarters in Virginia. The evidence before the trial court established that (1) a majority of the material witnesses were located outside Alabama, (2) the franchise operated by the Frakes' Precision Tune franchise was not even located in the venue in which this action was instituted, and (3) none of the alleged misrepresentations, which allegedly served as the basis for the Frakes' fraud claim, were made in Alabama. There is no evidence of difficulty on the part of the Frakes in maintaining this

action in Virginia, much less evidence that they "will for all practical purposes be deprived of [their] day in court." Therefore, neither the trial court nor the Alabama Court of Civil Appeals violated any of the principles set forth in *M/S Bremen* in enforcing the forum selection clause.

The Frakes attempt to hide behind an alleged "public policy" attendant to the Alabama DTPA, *Ala. Code* § 8-19-1 *et seq.* as a basis to keep the case in Alabama. However, the alleged acts by Respondents in this action which purportedly form the basis of the Frakes' DTPA claims did not occur in Alabama. Mr. Frakes' own testimony revealed that the alleged representations serving as predicate facts for these claims were made in Texas and Virginia, not Alabama. Though the Frakes harp on the alleged policy behind the DTPA, they do not present any legal authority for the notion that the Alabama Deceptive Trade Practices Act was intended to protect against alleged transactions and events occurring outside of Alabama. Furthermore, they present no evidence or even argument that they could not and did not waive any entitlement which they may have possessed in the past to assert a claim under the Alabama DTPA when Mr. Frakes executed the Franchise Agreement containing the forum selection clause and sued on the basis of the Franchise Agreement. This argument, like the Frakes' other arguments, is devoid of both factual and legal support.

Any contention that the dismissal of the action and initiation of the action in Virginia was unfair based upon the status of the case as of the date of its dismissal is simply untenable. First, Precision Tune sought dismissal of the pending claims on the grounds that such claims were not legally maintainable against Precision Tune. In addition to seeking dismissal, Precision Tune has

participated in several aspects of discovery in this matter. However, the discovery completed up to the present did not make dismissal of the suit unfair. Any discovery completed up to the present would have been completed in another forum if the action had been instituted in the proper forum. The discovery was conducted shortly after the case was filed and prior to (1) the change in the Alabama Supreme Court's analysis of the forum selection clauses, and (2) the extensive delay occasioned by the Frakes' out-of-state counsel's disciplinary problems. Dismissal does not deprive the Frakes of the opportunity to utilize this discovery or eliminate the benefits of this discovery. As shown through the foregoing, the only evidence pertaining to the analysis of the forum selection clause was presented by Precision Tune, which demonstrated the undisputed reasonableness and fairness of the forum selection clause.

In asserting their "public policy" argument, the Frakes wrote, "the Alabama Supreme Court also violated . . . the public policy interests of the State of Alabama, which specifically enacted the DTPA to protect Alabama citizens from the unfair deceptive trade practices of predatory out-of-state franchisors."[8] (Pet. at 2) In short, the Frakes request that this Court step into the shoes of the Alabama Supreme Court and dictate the public policy behind Alabama's DTPA. As recognized on previous

[8] The Frakes present interest in enforcing the alleged public policy behind the DTPA is somewhat disingenuous in light of the fact that they elected to pursue only their DTPA when confronted with the election of remedies provision provided in Ala. Code § 8-19-15 (1975), which is set forth in its entirety in the Appendix attached hereto.

occasions by this Court, the right of the State of Alabama to adopt legislation and dictate the public policy behind such legislation is vested *solely* in the State of Alabama. When the petitioner in *Diamond v. Charles*, 476 U.S. 54, 65, 106 S.Ct. 1697, 1705, 90 L.Ed.2d 48 (1986) sought "to compel the State to enact a code in accordance with [the petitioner's] interest," this Court responded, "the power to create and enforce a legal code, both civil and criminal is one of the quintessential functions of State," and "the State alone is entitled to create a legal code [and] defend[ ] the standards embodied in that code." (citations and quotations omitted) The Frakes' displeasure with any alleged policy statement made by the Alabama Supreme Court cannot serve as a basis for this Court's certiorari jurisdiction. First and foremost, the interpretation of state law, which does not conflict with federal law, is a matter solely within the purview of state courts. *See e.g. Lee v. Kemna*, 534 U.S. 362, 375, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002). As this Court instructed in *Allen v. Wright*, 468 U.S. 737, 754, 104 S.Ct. 3315, 3326, 82 L.Ed.2d 556 (1984), "an asserted right to have the [state] Government act in accordance with [state] law is not sufficient, standing alone, to confer jurisdiction on a federal court." Accordingly, the Frakes cannot manipulate this forum to redress their alleged complaints regarding Alabama's application of the public policy behind its own legislative enactments. Based upon the foregoing, it is evident that the enforcement of the forum selection clause did not contravene the principles in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). To the contrary, *M/S Bremen* demonstrates the propriety of the enforcement of the forum selection clause as well as the frivolity of the Frakes' argument to the contrary.

IV. This Court should not dramatically modify its decision in *M/S Bremen* and adopt a presumption that forum selection clauses are *per se* invalid.

Under cover of ostensibly heralding the cause of "victims of corporate fraud" across America, the Frakes propose an unwarranted and unprecedented, radical change in principles governing forum selection clauses. The Frakes would have this Court impose a "presumption of invalidity" on such clauses for a wide range of undefined "consumer protection cases" which would consume all franchise agreements (based upon the Frakes' proposal) and interject substantial uncertainty and spawn much, expensive litigation concerning issues which are currently settled. Petitioners' discussion of their view of the current status of consumer protection in America does nothing to warrant such a change in general, nor as it would directly affect the present case. The Frakes would have this Court ignore their knowing and voluntary execution of the Franchise Agreement in Virginia, and disregard the concepts of fairness and reasonableness inherent in the Court's present standard in favor of a "presumption of invalidity," creating an inappropriate obstacle to the enforcement of such provisions. This would have a dramatic negative impact on business in America.

In attempting to identify a legal basis for this argument, the Frakes rely, in large part, upon a decision rendered by the Supreme Court of New Jersey in *Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.*, 680 A.2d 616 (N.J. 1996). The Frakes' reliance upon *Kubis* is completely misplaced. The *Kubis* decision addressed the New Jersey Franchise Practices Act, N.J.S.A. 56: 10-1 to -15, which contains an express, statutory prohibition against

the enforcement of a forum selection clause set forth in a franchise agreement. 680 A.2d 616. In the present action, there is no such statutory provision in Alabama law which precluded the enforcement of forum selection clause in the Franchise Agreement. While the New Jersey Supreme Court refused to enforce the forum selection clause on the basis of a state statute, the Alabama Court of Appeals and, according to the Frakes, the Alabama Supreme Court reached a different decision, which was within the autonomous power vested in Alabama courts to interpret and apply its state law.

Based upon the Frakes' Petition, the Court might assume that the Circuit Court of Virginia had previously held (in an unreported decision) that "[a] forum selection clause [is] unenforceable when [a] defendant had no contacts with Virginia." (Pet. at 3) In fact, the Circuit Court of Virginia's decision in *Pinnacle Software Corp. v. Forms, Inc.*, 1991 WL 834966 (Va. Cir. Ct. 1991), held that the forum selection clause at issue in that case, which designated Virginia as the appropriate forum for disputes under the agreement, was not enforceable because neither of the corporate parties were incorporated or had their principal place of business in Virginia and no witnesses were located in Virginia and, thus, "there is no basis shown for the choice of Virginia as the appropriate forum." The circumstances presented in this case are clearly different. Virginia is the corporate home of Precision Tune as well as the alleged situs of the Frakes' claims in this case. The only two legal authorities citied by the Frakes, *Pinnacle Software* and *Kubis*, do not provide sufficient support for Petitioners' argument to justify this Court abandoning its decision in *M/S Bremen*. The Frakes' Petition for Writ of Certiorari is due to be denied.

V. Precision Tune, Grimaud Enterprises, Garies and Grimaud timely raised their venue-related objections.

In their Petition, the Frakes attempt to skirt the issues related directly to the forum selection clause by arguing that Respondents failed to raise the impropriety of venue in Alabama in a timely manner. (Pet. at 12) This is an argument based upon Alabama civil procedure which the Alabama courts already have rejected in this case. There is no appropriate basis at this point for further review. In Precision Tunes' Second Amended Motion to Dismiss, Precision Tune raised for the first time the defense of improper venue. Rule 12(h) of the *Alabama Rules of Civil Procedure* states, "[a] defense of . . . improper venue . . . is waived . . . (B) if it is neither made by motion under this rule nor included in a responsive pleading . . . ." In applying this requirement, the Alabama Supreme Court expressed, "a party can waive only an objection then available to him." *O'Brien Engineering Co. v. Continental Machines, Inc.*, 738 So.2d at 847 (1999) (quotations omitted); *see also Ex parte Monsanto Co.*, 2003 WL 558511, *10 (Ala. 2002).

The Frakes filed their initial Complaint in October of 1997, only three (3) months after the Alabama Supreme Court authorized the enforcement of forum selection clauses on the basis that such clauses deprive the trial court of subject matter jurisdiction. Precision Tune filed its first Motion to Dismiss on December 22, 1997. When Precision Tune submitted its Motion to Dismiss and Amended Motion to Dismiss, the decisions handed down by this Court, namely *Sutherland*, 700 So.2d 347 and *O'Brien*, 738 So.2d 884, instructed Precision Tune that the forum selection clauses deprived this Court of subject

matter jurisdiction, and did not provide a basis for the assertion of the defense of improper venue. Because Precision Tune could assert its objection on the basis of subject matter jurisdiction at any time during the pendency of the case, it was not necessary for it to have done so in its Motion to Dismiss and First Amended Motion to Dismiss. Shortly after the filing of these Motions, this action was placed on inactive status by the trial court for almost three (3) years as a result of issues related to Petitioners' prior counsel and mediation.

In July of 2000, the Alabama Supreme Court released its decision in *Ex parte CTB, Inc.*, 782 So.2d 188 (Ala. 2000). In *CTB*, the Supreme Court for the first time concluded that forum selection clauses invoke matters of venue, not jurisdiction as previously recognized. *Id.* at 190. In the *per curiam* opinion in *CTB*, the Alabama Supreme Court wrote, "Although this Court has previously held that 'outbound' forum-selection clauses providing for a trial outside Alabama are 'agreements concerning jurisdiction,' *Professional Ins. Corp. v. Sutherland,* 700 So.2d 347, 351 (Ala. 1997), we now recognize that such agreements actually 'implicate the venue of a court and not its subject-matter jurisdiction.'" *Id.* at 190. The express language of the *CTB* opinion recognized that this decision constituted the first occasion that the Supreme Court had enforced a forum selection clause and dismissed the action on the basis of improper venue.

In the first responsive pleading following the Court's holding in *Ex parte CTB*, Precision Tune asserted the defense of improper venue. Precision Tune's Second Amended Motion to Dismiss constituted the first responsive pleading filed since July 28, 2000, the date of the *Ex parte CTB* decision. In other words, Precision Tune moved

to dismiss the Frakes' claims on the basis of improper venue in the first responsive pleading filed since that objection was "available" to Precision Tune. As discussed previously, Precision Tune's Second Amended Motion to Dismiss on the basis of the forum selection clause gave rise to the remaining Respondents' argument that the claims asserted against them should be dismissed under the doctrine of *forum non conveniens*. Based upon the foregoing, the venue objections of Respondents were timely raised and properly granted by the trial court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RODERIC G. STEAKLEY
Counsel of Record
WILLIAM R. LUNSFORD
SIROTE & PERMUTT, P.C.
305 Church Street, Suite 800
P.O. Box 18248
Huntsville, Alabama 35804-8248
(256) 536-1711
Counsel for Respondents
Precision Tune Auto Care, Inc.,
Grimaud Enterprises, Inc.,
John Garies and
William Grimaud

APPENDIX

28 U.S.C. § 1257.

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Ala. Code § 6-5-430 (1975).

Whenever, either by common law or the statutes of another state or of the United States, a claim, either upon contract or in tort has arisen outside this state against any person or corporation, such claim may be enforceable in the courts of this state in any county in which jurisdiction of the defendant can be legally obtained in the same manner in which jurisdiction could have been obtained if the claim had arisen in this state; provided, however, the courts of this state shall apply the doctrine of forum non conveniens in determining whether to accept or decline to take jurisdiction of an action based upon such claim originating outside this state; and provided further that, if upon motion of any defendant it is shown that there exists a more appropriate forum outside this state, taking into

account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interests of justice, the court must dismiss the action without prejudice. Such dismissal may be conditioned upon the defendant or defendants filing with the court a consent (i) to submit to jurisdiction in the identified forum, or (ii) to waive any defense based upon a statute of limitations if an action on the same cause of action is commenced in the identified forum within 60 days of the dismissal.

Ala. Code § 8-19-1 (1975).

This chapter shall be known and may be cited as the "Deceptive Trade Practices Act."

Ala. Code § 8-19-15 (1975).

(a) The civil remedies provided herein and the civil remedies available at common law, by statute or otherwise, for fraud, misrepresentation, deceit, suppression of material facts or fraudulent concealment are mutually exclusive. An election to pursue the civil remedies prescribed in this chapter shall exclude and be a surrender of all other rights and remedies available at common law, by statute or otherwise, for fraud, misrepresentation, deceit, suppression of material facts or fraudulent concealment arising out of any act, occurrence or transaction actionable under this chapter.

(b) An election to pursue any civil remedies available at common law, by statute or otherwise, for fraud, misrepresentation, deceit, suppression of material facts or fraudulent concealment arising out of any act, occurrence or

transaction actionable under this chapter shall exclude and be a surrender of all rights and remedies available under this chapter. All other remedies, penalties or actions presently provided by statute or common law or hereafter provided for in any other law or rule of procedure are cumulative with the provisions, remedies and actions in this chapter and this chapter shall not be construed to repeal or supersede any law not inconsistent herewith.

Ala. R. Civ. P. 12(h).

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Ala. R. App. P. 32(c).

(1) *Acceptance of nonconforming documents.* The clerk of the appellate court may exercise discretion to permit the filing of documents in which the violation of those portions

of these rules governing format is exceedingly minor, if, in the judgment of the clerk, recomposition of the documents would be unwarranted. The requirements of this rule governing the format of documents shall be liberally construed to do substantial justice with respect to persons proceeding pro se.

(2) *Conditional filing of documents.* Except as otherwise provided in subparagraph (c)(1), unless each copy of the document, in the judgment of the clerk, conforms to those portions of these rules governing format, the clerk may deem the document to have been conditionally filed, subject to the requirement that the party file in the office of the clerk a complete set of replacement documents that comply with these rules within 14 days of the issuance of notice by the clerk that the documents have been conditionally filed. The clerk's notice shall specify the matters requiring correction and, unless the court orders otherwise, in no event shall any replacement document add any substantive material.

(3) *Documents exceeding page limitations.* Documents exceeding the page limitations that are filed without prior approval of the court are viewed with great disfavor and, with respect to such documents, the court may impose a penalty, not to exceed five pages, thereby reducing the otherwise applicable page limitation.

(4) *Disposition of noncompliant documents.* Noncompliant documents will be held in the clerk's office pending instructions from the party filing the document as to their disposition. If no instructions are received by the time for filing replacement documents, noncompliant documents will be discarded.

(5) *Effect on time for filing by opposing party.* Unless the court orders otherwise, the time for filing of the opposing party's response runs from the date of filing of replacement documents pursuant to subparagraph (c)(2).

Ala. R. App. P. 39.

(a) **Considerations Governing Certiorari Review; Grounds.** Certiorari review is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons for the issuance of the writ.

(1) *Civil Cases and Non-Death-Penalty Criminal Cases.* In all civil cases and in all criminal cases other than cases in which the death penalty is imposed, petitions for writs of certiorari will be considered only:

(A) From decisions initially holding valid or invalid a city ordinance, a state statute, or a federal statute or treaty, or initially construing a controlling provision of the Alabama Constitution or the United States Constitution;

(B) From decisions that affect a class of constitutional, state, or county officers;

(C) From decisions where a material question requiring decision is one of first impression in Alabama;

(D) From decisions in conflict with prior decisions of the Supreme Court of the United States, the Supreme Court of Alabama, the Alabama Court of

Criminal Appeals, or the Alabama Court of Civil Appeals; provided that:

1. When (a)(1)(D) is the basis of the petition, the petition must quote that part of the opinion of the court of appeals and that part of the prior decision the petitioner alleges are in conflict; or

2. Where it is not feasible to quote that part of the opinion either because no wording in the opinion clearly shows the conflict or because no opinion was issued, the petition shall state specifically and with particularity how the decision conflicts with a prior decision; and,

(E) Where the petitioner seeks to have overruled controlling Alabama Supreme Court cases that were followed in the decision of the court of appeals.

(2) *Death-Penalty Cases.* When the Court of Criminal Appeals has affirmed a sentence imposing the death penalty, counsel who represented the appellant on the appeal to the Court of Criminal Appeals or successor counsel shall prepare and file in the Supreme Court a petition for a writ of certiorari for review of the decision of the Court of Criminal Appeals. That petition shall be governed by this rule, except that:

(A) In addition to the bases for consideration of petitions for the writ of certiorari listed in subsection (a)(1) of this

rule, a petition for a writ of certiorari will also be considered from a decision failing to recognize as prejudicial any plain error or defect in the proceeding under review whether or not the error or defect was brought to the attention of the trial court or the Court of Criminal Appeals.

(B) In addition to the requirements of subsection (d)(3) of this rule, dealing with the form of the petition, when review is sought for failing to recognize as prejudicial any plain error or defect, the petition shall contain a concise statement of the grounds, including a description of the issue and circumstances warranting plain-error review.

(C) The Supreme Court may enlarge the time for filing the petition. See Rule 2(b).

(D) The scope of review discussed in subsection (k) of this rule is modified only to the extent necessary to permit the Supreme Court to notice any plain error or defect in the proceeding under review, whether or not brought to the attention of the trial court or the Court of Criminal Appeals or set forth in the petition, and to take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial rights of the petitioner; provided, however, that nothing in this subsection shall require the Supreme Court to conduct an independent review for the purpose for

determining the existence of plain error.

(E) The provisions of this subsection (a)(2) shall be effective May 19, 2000.

(b) Review by Petition for Writ of Certiorari of Decisions of the Court of Civil Appeals.

(1) *Application for Rehearing Not Prerequisite to Certiorari Review.* The filing of an application for rehearing in the Court of Civil Appeals is not a prerequisite to review by certiorari in the Supreme Court. If an application for rehearing was filed, however, it must have complied with Rule 40(e).

(2) *Docket Fee.* Payment of the amount prescribed in Rule 35A(a)(3) is to be made to the clerk of the Supreme Court when the petition for the writ of certiorari is filed.

(3) *Time for Filing.* The petition for a writ of certiorari, with an accompanying brief, shall be filed with the clerk of the Supreme Court pursuant to Rule 25(a), within 14 days (2 weeks) after the release of the decision of the Court of Civil Appeals. If an application for rehearing has been filed with the Court of Civil Appeals, the petition for the writ of certiorari shall be filed within 14 days (2 weeks) of the decision of that court on the application for rehearing.

(c) Review by Petition for Writ of Certiorari of Decisions of the Court of Criminal Appeals.

(1) *Application for Rehearing Prerequisite to Certiorari Review.* The filing of an application for rehearing in the Court of Criminal Appeals is a

prerequisite to review by certiorari in the Supreme Court, except:

(A) In the case of a pretrial appeal by the state in a criminal case (see Rule 15.7, Alabama Rules of Criminal Procedure), or

(B) In the case of review of a decision by the Court of Criminal Appeals on an original petition for writ of mandamus where the petitioner seeks review by the Supreme Court by petition for writ of mandamus pursuant to Rule 21(e) of these Rules.

In those cases in which an application for rehearing is required, the application must comply with Rule 40(e).

(2) *Time for Filing.* The petition for the writ of certiorari, with an accompanying brief, shall be filed with the clerk of the Supreme Court pursuant to Rule 25(a), within 14 days (2 weeks) of the decision of the Court of Criminal Appeals on the application for rehearing, except that in the case of a pretrial appeal by the state in a criminal case, the petition for the writ of certiorari must be filed within 7 days (1 week) of the judgment of the Court of Criminal Appeals or within 7 days (1 week) of that court's order overruling an application for rehearing.

(d) Form and Length of Petition. The petition shall comply with the provisions of Rule 32(b)(2) governing form and shall not exceed 15 pages (except in capital cases, in which event the petition shall not exceed 20 pages), as also provided in Rule 32(b)(2). The petition shall contain:

(1) The style of the case, the name of the petitioner, the circuit court from which the cause is on appeal, and the name of the court of appeals to which the petition for certiorari is directed;

(2) The date of the decision sought to be reviewed and, if an application for rehearing was filed, the date of the order overruling the application for rehearing;

(3) A concise statement of the grounds, 39(a)(1)(A)-(E), supra, on which the petition is based – and in a death-penalty case a statement in accordance with 39(a)(2)(A) and (B) – provided that:

> (A) When subparagraph (a)(1)(D) is the ground for the petition, the petitioner must quote that part of the opinion of the court of appeals and that part of the prior decision the petitioner alleges are in conflict; or
>
> (B) Where it is not feasible to quote that part of the opinion of the court of appeals either because no wording in the opinion clearly shows the conflict or because no opinion was issued, the petition shall state specifically and with particularity how the decision conflicts with a prior decision;

(4) A copy of the opinion or the unpublished memorandum of the court of appeals, attached to the petition as an exhibit; and

(5) A statement of the facts, if a party is not satisfied with the facts stated in the opinion or the unpublished memorandum of the court of

appeals, or if the court of appeals issued a "no-opinion" decision pursuant to Rule 53. The statement of facts shall not be incorporated or adopted by reference from any other document, including the party's brief in support of the petition.

(A) Statement of facts where application for rehearing was filed with court of appeals after an opinion or an unpublished memorandum was issued. If a court of appeals issues an opinion or an unpublished memorandum containing a statement of facts and the party applying for rehearing is not satisfied with that statement, the party applying for rehearing in that court may, in the application, present to the court of appeals an additional or corrected statement of facts or the applicant's own statement of facts. If the court of appeals does not include the applicant's statement of facts in a subsequent opinion or memorandum, in order for the Supreme Court to consider those facts in addition to the facts as stated in the court of appeals' opinion or unpublished memorandum, the proposed statement of additional or corrected facts or the applicant's own statement of facts presented to the court of appeals in the application for rehearing must be copied verbatim in the statement of facts in the petition for the writ of certiorari, with references to the pertinent portions of the clerk's record and the reporter's transcript. The petition must

include a verification that this statement of facts is a verbatim copy of the statement presented to the court of appeals in the application for rehearing. If the petitioner does not present in the petition an additional or corrected statement of facts or the petitioner's own statement of facts, it will be presumed that the petitioner is satisfied with the facts as stated in the court of appeals' opinion or unpublished memorandum.

(B) Statement of facts where an application for rehearing was filed with court of appeals in a "no-opinion" decision or an opinion that does not state the facts. If a court of appeals issues a "no-opinion" affirmance pursuant to Rule 53 or issues an opinion or unpublished memorandum that does not contain a statement of facts, the applicant shall include in the application for rehearing the applicant's statement of facts. If the court of appeals does not include the applicant's statement of facts in a subsequent opinion or memorandum, a verbatim copy of the applicant's statement of facts as presented to the court of appeals must be included in the petition for the writ of certiorari, with references to the pertinent portions of the clerk's record and the reporter's transcript. The petition must include a verification that the statement of facts is a verbatim copy of the statement presented to the court of appeals in the application for rehearing.

(C) Statement of facts where no application for rehearing was filed with the Court of Civil Appeals. If the petition for a writ of certiorari seeks review of a decision of the Court of Civil Appeals and the petitioner has not filed an application for rehearing with the Court of Civil Appeals, and if the Court of Civil Appeals issues a "no-opinion" affirmance pursuant to Rule 53 or issues an opinion that does not contain a statement of facts, the petitioner shall include in the petition for the writ of certiorari the petitioner's statement of facts, with references to the pertinent portions of the clerk's record and the reporter's transcript. If the Court of Civil Appeals issues an opinion containing a statement of facts and the party petitioning for the writ of certiorari is not satisfied with that statement of facts, the petitioner may, in the petition for the writ of certiorari, present to the Supreme Court a proposed additional or corrected statement of facts or the applicant's own statement of facts, with references to the pertinent portions of the clerk's record and the reporter's transcript. If the petitioner does not present in the petition an additional or corrected statement of facts or the petitioner's own statement of facts, it will be presumed that the petitioner is satisfied with the facts as stated in the court of appeals' opinion.

(e) Number of Copies of Briefs; Filing and Service. The original and nine copies of the petition and brief shall

be filed with the clerk of the Supreme Court; one copy shall be filed with the clerk of the appropriate court of appeals; and one copy shall be served on each party to the proceeding in the court of appeals, including those parties not joining in the petition.

(f) Briefing on Petition for Writ of Certiorari.

(1) *Petitioner's Brief.* The petitioner's brief shall be in a form prescribed by Rule 32(a), and copies served and filed as prescribed by Rule 31 for the service and filing of briefs. The brief shall accompany the petition for the writ of certiorari or shall be attached thereto. The brief must contain all arguments in support of the petition that the petitioner intends to present, including those arguments the court will consider if certiorari review is granted.

(2) *Respondent's Brief.* Within 14 days (2 weeks) – or, in the case of a pretrial appeal by the state in a criminal case, within 7 days (1 week) – after the petition and brief are filed, the respondent may file an initial brief limited solely to the issue whether any of the grounds set forth in (a)(1)(A)-(E) – or, in a death-penalty case, (a)(2)(A) and (B) – authorizes the issuance of a writ. The respondent's initial brief shall be in a form prescribed in Rule 32(a).

(3) *Subsequent Briefs.* No additional briefs will be required of the petitioner, although the petitioner may file a reply brief in a form prescribed in Rule 32(a) within 14 days (2 weeks) after the respondent's brief is filed.

(g) Action on the Petition by Supreme Court if Writ Issues. If the Supreme Court, upon preliminary consideration, concludes that there is a probability of merit in

the petition and that the writ should issue, it shall be so ordered, and due notice shall be given by the clerk to the parties or their counsel and to the clerk of the appropriate court of appeals. The record and one copy of the briefs and appendices, if any, shall be transmitted to the clerk of the Supreme Court. The case shall stand for submission as herein provided.

(h) Briefing if Writ Issues.

(1) *Respondent's Brief.* If the writ should issue, the respondent may file, within 14 days (2 weeks) – or, in the case of a pretrial appeal by the state in a criminal case, within 7 days (1 week) – after the clerk has given notice that the writ has been issued, a subsequent reply brief addressed to the substantive issues presented for review on the petition for writ of certiorari. The respondent's subsequent reply brief shall be in a form prescribed in Rule 32(a).

(2) *Petitioner's Brief.* The petitioner may file a brief in response to the respondent's reply brief within 14 days (2 weeks) of the filing of the respondent's reply brief. The petitioner's brief in response to the respondent's reply brief shall be in a form prescribed in Rule 32(a). The petitioner shall not be permitted to file a brief in response to the respondent's reply brief in a pretrial appeal by the state in a criminal case.

(i) Oral Argument. There will be no oral argument on the preliminary examination of a petition for writ of certiorari. In the event the writ is issued, either party may request oral argument. The request shall be in writing made within 14 days (2 weeks) – or, in the case of a pretrial appeal by the state in a criminal case, within 7 days (1 week) – after the clerk has given notice that the writ

has issued. The request shall contain a statement of the reasons the Supreme Court should hear oral argument. A copy of the request shall be served on all parties involved in the proceeding on certiorari review.

(j) Submission. If either party requests oral argument, the clerk of the Supreme Court shall endorse that fact on the proper docket and if, after examining the criteria of Rule 34, the court determines that oral argument is necessary, the clerk shall set the case down for oral argument and notify the parties or their attorneys of record in writing that oral argument has been set. If neither party requests oral argument as herein provided, or if the Supreme Court determines that oral argument is unnecessary, the clerk of the Supreme Court shall, when briefs from all parties have been filed with the clerk as herein provided, immediately submit the case upon the record and briefs.

(k) Scope of Review. The review shall be that generally employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the particular court of appeals, unless the petitioner has attempted to enlarge or modify the statement of facts as provided by Rule 39(d)(5). The scope of review includes the application of the law to the stated facts.

(l) **Rehearing.** No application for rehearing shall be received in the Supreme Court if the petition for certiorari is denied, quashed, or stricken.

(m) Review in Supreme Court of Decisions of Courts of Appeals on Petitions for Extraordinary Writs. A party aggrieved by a decision of a court of appeals on a petition for a writ of mandamus or prohibition or

other extraordinary writ is entitled to review in the Supreme Court as provided in Rule 21(e).